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SUBJECT: PROSECUTOR IN BERLUSCONI TRIAL CALLS LAW  
SUSPENDING CASES UNCONSTITUTIONAL

REF: A) ROME 2799 B) ROME 2529

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1. (U) SUMMARY: Prime Minister Berlusconi's judicial bribery case is on hold for the immediate future. As expected, the prosecuting magistrates in the case used a scheduled June 25 hearing to charge that the law suspending the trial is unconstitutional. The court will decide on June 30 whether to accept prosecution arguments and seek a review by the Constitutional Court. Whether it does or does not seek the review, the case will be suspended, likely long enough to allow Parliament to pass a constitutional amendment with similar provisions to the current law. END SUMMARY.

2. (U) Prime Minister Berlusconi did not appear at the scheduled June 25 hearing in the "SME" judicial bribery case against him. His attorneys requested a suspension on the basis of the newly-passed law precluding trials against the five highest Italian officials while in office (refs and previous). President Ciampi signed the legislation, which became effective on June 22. The Greens and Communist parties have begun an initiative to bring a referendum to repeal the law, but this would be a lengthy process. A referendum could not be scheduled before next spring, at the earliest.

3. (U) Also as expected, Ilda Boccasini and Gherardo Colombo, the prosecuting magistrates in the case, criticized Berlusconi for failing to appear at the hearing and requested a constitutional review of the law. Colombo argued that the law is unconstitutional because:

-- all citizens are equal before the law; high constitutional figures should not be treated differently where non-political crimes are concerned;

-- trials should not be "unduly" long;

-- magistrates are obliged under the Italian constitution to pursue any offense brought before them (COMMENT: Which has the practical effect of allowing the judiciary -- not the Justice Ministry or the government -- to set investigative and prosecutorial priorities. END COMMENT.); and

-- Italian legal principle states that the work of the magistracy should not be impeded.

Colombo also asserted that the law violated the European Convention on Human Rights and should have been a constitutional amendment, not an ordinary law.

4. (U) The Milan tribunal will reconvene June 30 to determine whether it accepts the prosecutors' arguments. If it were to disagree, the trial would be suspended under the new law. If the tribunal concurs, the law would be sent to the Constitutional Court for review. The preponderance of pundits, experts, journalists, and other observers predicts that the Constitutional Court will be in no hurry to conclude its review. Court members are selected by Parliament, the President of the Republic, and by their fellow magistrates, and thus have known political backgrounds. While on the Court, however, they tend to hold themselves as part of an "institutional" entity above the political fray. Like President of the Republic Ciampi (and unlike some of their fellow magistrates), Constitutional Court judges tend to avoid overt political activism during their tenures. They would likely be susceptible to Ciampi's public calls (not directed to the Court) for political stability during Italy's EU Presidency, at a minimum.

5. (U) Ciampi, meanwhile, in an official visit to Germany on June 26, was asked by a student at a Berlin University conference why he countersigned the new law. Ciampi responded that, although he usually does not discuss domestic politics when abroad, he would answer this question. The Constitutional Court is responsible for reviewing a law's constitutionality, he explained, and the President of the Republic can send a law back to Parliament only in cases of manifest unconstitutionality. If

Parliament were to approve the law a second time, the President would be obliged to sign it. Ciampi added that, in the last twenty years, fewer than 100 laws were overturned by the Constitutional Court.

16. (SBU) COMMENT: We are fast approaching the point when

the Berlusconi trial and possible outcomes will no longer be worth reporting. A constitutional amendment (with even some opposition support) mirroring the just-passed law is making its way through Parliament. Assuming the pundits and we are correct in predicting the Constitutional Court will not act rapidly, an amendment would likely be far enough along in the process to obviate questions on the current law's constitutionality by the time the Court undertakes its review. Opponents could still organize a referendum, but would have high obstacles (participation of 50 percent plus one of Italian voters, with a majority voting in favor) to overturn either the just-passed law or a future constitutional amendment.

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